

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARISE FOR SOCIAL JUSTICE;
CIVIL RIGHTS; NEW ENGLAND STATE-AREA
CONFERENCE OF THE NAACP;
REV. TALBERT W. SWAN, II;
NORMAN W. OLIVER; DARLENE
ANDERSON; GUMERSINDO GOMEZ;
FRANK BUNTIN; RAFAEL RODRIQUEZ;
and DIANA NURSE

Plaintiffs,

v.

CITY OF SPRINGFIELD and SPRINGFIELD
ELECTION COMMISSION,

Defendants.

Civil Action No. 05-30080 MFP

AFFIDAVIT OF PAUL E. NEMSER, ESQ.

Paul E. Nemser, Esquire, being under oath, deposes and says:

1. I am a partner at Goodwin Procter LLP and a member in good standing of the Massachusetts Bar and the Bar of this Court, and I am counsel for the plaintiffs in the above case. I make this affidavit upon personal knowledge.

2. I submit this Affidavit to refute the suggestion of defense counsel that I or other attorneys representing the plaintiffs violated Rule 3.6 of the Model Rules of Professional Conduct.

3. While I personally have never met or otherwise communicated with Representative Cheryl Coakley-Rivera, other attorneys representing the plaintiffs have been working with her during at least the past month to prepare a trial affidavit in this case (the

“Affidavit”). In particular, Representative Coakley-Rivera has been working with my co-counsel Nadine Cohen of the Lawyers Committee for Civil Rights and Anna-Marie Tabor of Goodwin Procter. At various points during the past month, I read drafts of the Affidavit, and during the past week, I was aware that Ms. Tabor was making efforts to finish the Affidavit and obtain the affiant’s signature. My understanding from Ms. Tabor and Ms. Cohen is that Representative Coakley-Rivera had a copy of her Affidavit.

4. During the afternoon on February 2, 2007, I asked Ms. Tabor and another Goodwin Procter associate, Monica Franceschini, which of plaintiffs’ affidavits might pose problems for completion within the Court’s filing deadline of February 2, 2007. The list of potential problems was short, and I believe that Representative Coakley-Rivera’s Affidavit was not listed as one of the potential problems. Around 4:30 pm, I told Ms. Franceschini to direct the person responsible for electronic filing of affidavits to begin filing as soon as possible and not to delay. I left work a little after 5:00 pm.

5. After 9:30 pm on Friday, at my home, I listened to my office voicemail and heard a message from Edward Pikula stating that the Mayor’s Aide had come into his office saying she had received a call from the press concerning Representative Coakley-Rivera’s affidavit. Mr. Pikula stated in the message that he did not have a copy of the Affidavit, and he asked me for one.

6. I looked in my Blackberry to find the Court’s ECF filing notice for the Coakley-Rivera Affidavit and sent Mr. Pikula the email attached hereto as Exhibit A. The ECF notice showed that the Affidavit was filed at 6:21 pm.

6. I also sent an email to Ms. Cohen, Ms. Tabor, and Ms. Franceschini—each of whom has dealt with Mr. Pikula—asking if they had heard from Mr. Pikula about the Coakley-Rivera Affidavit. Eventually each replied by email that she had not heard from him.

7. I have never had any contact with the press—directly or indirectly—about Representative Coakley-Rivera’s trial Affidavit or its contents. In fact, as best I can remember, I had no contact with the press about this case during the last half of 2006, and I am certain that I had no contact in 2007. In particular, on Friday, February 2, 2007, I did not contact the press about the affidavit or its contents or about this case, and I have had no subsequent contact with the press about those subjects. I did not release Representative Coakley-Rivera’s Affidavit to the press, cause it to be released, suggest that it be released, or contemplate that anyone would release it before it was filed in court. I was unaware of any plan by any person to release the Affidavit or its contents to the press before filing.

7. At 12:24 pm on Saturday, February 3, 2007, I received an email from Mr. Pikula, a copy of which is attached hereto as Exhibit B. I read it on my Blackberry and responded at 12:58 pm with the email attached hereto as Exhibit C.

8. At 8:25 am on Monday, February 5, 2007, I received an email from Mr. Pikula a copy of which is attached hereto as Exhibit D.

9. That same day, I communicated with each lawyer on our legal team who had done any work concerning trial affidavits, including Ms. Cohen, Ms. Franceschini, Ms. Tabor, Mr. Daniel Urman and Ms. Yael Aufgang, as well as Goodwin Procter paralegal Jackie Mosher, to determine if any of them had had any contact with the press or had had any basis to believe that Representative Coakley-Rivera’s Affidavit would be disclosed to the press before it was filed in

court. Each person informed me that he or she had not had any contact with the press and had not had any basis to believe that the Affidavit would be disclosed before filing.

10. At 2:34 pm on Monday, February 5, 2007, I sent Mr. Pikula the email attached hereto as Exhibit E. I note that Mr. Pikula did not supply Exhibit E to the Court in connection with his Opposition to Motion to Set Deadline. In that email I stated concerning the Coakley-Rivera affidavit: "We did not disclose it (or its contents) to anyone in the press, cause it to be disclosed to the press, suggest that anyone disclose it to the press, or contemplate that it was going to be disclosed to the press before it was filed. A person at Goodwin Procter who handles electronic filing filed the affidavit with the Court on Friday evening, apparently at 6:21 pm. That was the only way we published the affidavit or its contents." I still believe those statements to be true.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 7th OF
FEBRUARY, 2007.

/s/ Paul E. Nemser
Paul E. Nemser

LIBA/1763728.1

EXHIBIT A

Nemser, Paul E

From: Nemser, Paul E
Sent: Friday, February 02, 2007 9:46 PM
To: 'epikula@springfieldcityhall.com'
Subject: Fw: Activity in Case 3:05-cv-30080-MAP Arise for Social Justice, et al. v. City of Springfield, et al. "Affidavit"

I was out of the office and just got your phone message from earlier this evening. Here is the court's link to the Coakley-Rivera affidavit. If this doesn't work and you still don't have it let me know.

Sent from my BlackBerry Wireless Handheld

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United States District Court

District of Massachusetts

Notice of Electronic Filing

The following transaction was received from Nemser, Paul entered on 2/2/2007 at 6:21 PM EST and filed on 2/2/2007

Case Name: Arise for Social Justice, et al. v. City of Springfield, et al.
Case Number: 3:05-cv-30080 <<https://ecf.mad.uscourts.gov/cgi-bin/DktRpt.pl?97318>>
Filer: Talbert Swan, II
Frank Buntin
Norman W. Oliver
Rafael Rodriquez
Arise for Social Justice
?Oiste?
New England State-Area Conference of the NCAAP
Darlene Anderson
Gumersindo Gomez
Diana Nurse

Document Number: 94 <https://ecf.mad.uscourts.gov/cgi-bin/show_case_doc?94,97318,,16739315,,,387>

Docket Text:

AFFIDAVIT of Cheryl Coakley-Rivera by New England State-Area Conference of the NCAAP, Talbert Swan, II, Norman W. Oliver, Darlene Anderson, Gumersindo Gomez, Arise for Social Justice, Frank Buntin, Rafael Rodriquez, Diana Nurse, ?Oiste?. (Nemser, Paul)

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Document description:Main Document

Original filename:yes

Electronic document Stamp:

[STAMP dcecfStamp_ID=1029851931 [Date=2/2/2007] [FileNumber=1750533-0]
[6b758fe5250f1358a29db483093fb1ef26964f004c67431e6ac7901f8f312378178e
ffdac7a40c10346ccad6bde4e084b3562add65baceaeef6b3863bf23c7768]]

3:05-cv-30080 Notice will be electronically mailed to:

Nadine M. Cohen ncohen@lawyerscom.org

J. Anthony Downs jdowns@goodwinprocter.com

Monica Meier Franceschini mfranceschini@goodwinprocter.com

Paul E. Nemser pnemser@goodwinprocter.com

Edward M. Pikula epikula@omcp-law.com, epikula@springfieldcityhall.com;
attyemp@aol.com

3:05-cv-30080 Notice will not be electronically mailed to:

EXHIBIT B

Nemser, Paul E

From: Pikula, Edward [epikula@springfieldcityhall.com]
Sent: Saturday, February 03, 2007 12:23 PM
To: Nemser, Paul E
Subject: RE: Activity in Case 3:05-cv-30080-MAP Arise for Social Justice, et al. v. City of Springfield, et al. "Affidavit"

Thanks for the email at 9:46 PM on a Friday night. You could have had the decency to provide a copy to this office prior to giving it to the press. I am outraged that you have given this to the press before you filed this with the court. I would not have expected this from an attorney from Goodwin and Procter.

Attorney Edward M. Pikula
City of Springfield Law Department
36 Court Street
Springfield, Massachusetts 01103
Phone: (413) 787- 6085
Fax: (413) 787- 6173

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Filer: Talbert Swan, II

Frank Buntin

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Arise for Social Justice

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ffdac7a40c10346ccad6bde4e084b3562add65baceaf6b3863bf23c7768]]

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Paul E. Nemser pnemser@goodwinprocter.com

Edward M. Pikula epikula@omcp-law.com, epikula@springfieldcityhall.com; attyemp@aol.com

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2/7/2007

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EXHIBIT C

Nemser, Paul E

From: Nemser, Paul E
Sent: Saturday, February 03, 2007 12:58 PM
To: 'epikula@springfieldcityhall.com'
Subject: Re: Activity in Case 3:05-cv-30080-MAP Arise for Social Justice, et al. v. City of Springfield, et al. "Affidavit"

Your outrage is completely misplaced. I gave nothing to the press nor have I any idea how the press got it. To my knowledge no lawyer on our side had any contact with the press yesterday and I am not aware of any plan to contact the press directly indirectly or otherwise, and I will sign an affidavit saying so. . We just filed with the court. Did you file affidavits?

Sent from my BlackBerry Wireless Handheld

----- Original Message -----

From: Pikula, Edward <epikula@springfieldcityhall.com>
To: Nemser, Paul E
Sent: Sat Feb 03 12:23:24 2007
Subject: RE: Activity in Case 3:05-cv-30080-MAP Arise for Social Justice, et al. v. City of Springfield, et al. "Affidavit"

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EXHIBIT D

Nemser, Paul E

From: Pikula, Edward [epikula@springfieldcityhall.com]
Sent: Monday, February 05, 2007 8:25 AM
To: Nemser, Paul E
Subject: RE: Activity in Case 3:05-cv-30080-MAP Arise for Social Justice, et al. v. City of Springfield, et al. "Affidavit"

The story ran on TV before the Affidavit was filed in court and before you revealed the allegations to me as opposing counsel making it impossible to intelligently respond. Moreover, the allegations go back years. If you thought they were important, why didn't you reveal them sooner? It is reasonable to assume that such a leak to the press would amount to an ambush and in my opinion you knew or should have know that such a leak could poison the well of potential witnesses against the city, in an attempt to influence the litigation with evidence that has no relevance to the method of electing city councilors and school committee persons. We are continuing to attempt to get signatures to affidavits that people agreed to provide, but I would expect that the manner of releasing this affidavit will make it more difficult, and we will need more time.

Attorney Edward M. Pikula
City of Springfield Law Department
36 Court Street
Springfield, Massachusetts 01103
Phone: (413) 787- 6085
Fax: (413) 787- 6173

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2/7/2007

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Your email of this morning raises a number of issues.

First, you still imply that we—the plaintiffs' lawyers--had something to do with the disclosure of the Coakley-Rivera affidavit to the press before it was filed in court. I have communicated with the lawyers on our legal team. We did not disclose it (or its contents) to anyone in the press, cause it to be disclosed to the press, suggest that anyone disclose it to the press, or contemplate that it was going to be disclosed to the press before it was filed. A person at Goodwin Procter who handles electronic filing filed the affidavit with the Court on Friday evening, apparently at 6:21 pm. That was the only way we published the affidavit or its contents. Therefore, if the press got the affidavit before it was filed, someone other than the plaintiffs' lawyers did it. Representative Coakley-Rivera obviously had a copy of the affidavit, and I do not know whether others had access to the affidavit through her.

I also note that your conclusion that plaintiffs' lawyers disclosed the Coakley-Rivera affidavit to the press before filing makes no sense. From plaintiffs' standpoint, there was no reason to single out that one affidavit among the 28 that we filed. If the point were to publicize plaintiffs' positions, we would have disclosed most or all of the affidavits. Most of the affidavits contain significant probative material about the individual witness's experiences as a person of color in Springfield, including experiences with and observations of racism or discrimination. There is no gag order in this case. Had we contacted the press to discuss the content of the Coakley-Rivera affidavit or any other affidavit on the public record, such contact would have been entirely ethical and appropriate. But we did not reveal affidavits to the press. We issued no press release, conducted no press campaign, and "leaked" nothing. Indeed, we have not had contact with the press since the affidavits were filed.

Second, your email says: "you knew or should have know[n] that such a leak could poison the well of potential witnesses against the city." This is wrong on several levels. I and my colleagues did not know or even contemplate that the affidavit would be disclosed to the press before it was filed. Therefore, there was no reason to anticipate what a "leak" would do.

You seem to imply that there was a duty to expect that a witness or someone else would disclose an affidavit to the press before we filed, or that there was a duty to disclose the contents of Ms. Coakley-Rivera's affidavit in advance of filing. As to anticipating a disclosure, we had no basis for believing that anyone would make such a disclosure before we filed. In any event, most of our witnesses are citizens of Springfield who are neither our clients nor under any plaintiff's control. As to a duty to disclose in advance the contents of Representative Coakley-Rivera's trial affidavit, in our witness list we made a disclosure of the subject matter of her testimony sufficient to cover the contents of her affidavit. Defendants did not object to this disclosure—for example, by requesting additional specificity. I am not aware of any other source of a duty to give you advance disclosure of the contents of a witness's direct testimony.

Finally, your point about "poisoning the well of potential witnesses" and your suggestion that your need for more time to complete your affidavits is somehow tied to the press's report about Representative

2/7/2007

Coakley-Rivera's affidavit does not hold water. Your trial affidavits, like ours, were due last Friday. The testimony of your witnesses, I should think, had largely been set before Friday. I do not see how a disclosure late Friday could have changed your near-complete affidavits. Moreover, whenever the press first received or published its information, we filed the affidavit at 6:21 pm, so that there could not have been a long period when the press had the information, but the affidavit had not yet been filed. And once the affidavit was filed, the information in it became part of the public record.

The more pertinent issue here is not the press coverage of Representative Coakley-Rivera's affidavit, but that defendants filed no affidavits on Friday. You and I both told the court that we believed we were on track to meet the February 2 deadline, but there might be "straggler" affidavits filed today, Monday. Last week you confirmed to me that you thought you would have "4 or 5" to file today. I said that we were trying to get ours done, but might be in the same boat. Plaintiffs completed and filed 28 affidavits. We expect to file one more substantive affidavit and a few document-related affidavits. By my count, there were 41 witnesses on the defense list submitted to the Court. It is beyond comprehension that defendants could file no affidavits by the deadline.

-----Original Message-----

From: Pikula, Edward [mailto:epikula@springfieldcityhall.com]

Sent: Monday, February 05, 2007 8:25 AM

To: Nemser, Paul E

Subject: RE: Activity in Case 3:05-cv-30080-MAP Arise for Social Justice, et al. v. City of Springfield, et al.
"Affidavit"

The story ran on TV before the Affidavit was filed in court and before you revealed the allegations to me as opposing counsel making it impossible to intelligently respond. Moreover, the allegations go back years. If you thought they were important, why didn't you reveal them sooner? It is reasonable to assume that such a leak to the press would amount to an ambush and in my opinion you knew or should have known that such a leak could poison the well of potential witnesses against the city, in an attempt to influence the litigation with evidence that has no relevance to the method of electing city councilors and school committee persons. We are continuing to attempt to get signatures to affidavits that people agreed to provide, but I would expect that the manner of releasing this affidavit will make it more difficult, and we will need more time.

Attorney Edward M. Pikula
City of Springfield Law Department
36 Court Street
Springfield, Massachusetts 01103
Phone: (413) 787- 6085
Fax: (413) 787- 6173

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2/7/2007

-----Original Message-----

From: Nemser, Paul E [mailto:PNemser@goodwinprocter.com]
Sent: Saturday, February 03, 2007 12:58 PM
To: Pikula, Edward
Subject: Re: Activity in Case 3:05-cv-30080-MAP Arise for Social Justice, et al. v. City of Springfield, et al. "Affidavit"

Your outrage is completely misplaced. I gave nothing to the press nor have I any idea how the press got it. To my knowledge no lawyer on our side had any contact with the press yesterday and I am not aware of any plan to contact the press directly indirectly or otherwise, and I will sign an affidavit saying so. . We just filed with the court. Did you file affidavits?

Sent from my BlackBerry Wireless Handheld

----- Original Message -----

From: Pikula, Edward <epikula@springfieldcityhall.com>
To: Nemser, Paul E
Sent: Sat Feb 03 12:23:24 2007
Subject: RE: Activity in Case 3:05-cv-30080-MAP Arise for Social Justice, et al. v. City of Springfield, et al. "Affidavit"

Thanks for the email at 9:46 PM on a Friday night. You could have had the decency to provide a copy to this office prior to giving it to the press. I am outraged that you have given this to the press before you filed this with the court. I would not have expected this from an attorney from Goodwin and Procter.

Attorney Edward M. Pikula
City of Springfield Law Department
36 Court Street
Springfield, Massachusetts 01103
Phone: (413) 787- 6085
Fax: (413) 787- 6173

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-----Original Message-----

From: Nemser, Paul E [mailto:PNemser@goodwinprocter.com]
Sent: Friday, February 02, 2007 9:46 PM
To: Pikula, Edward
Subject: Fw: Activity in Case 3:05-cv-30080-MAP Arise for Social Justice, et al. v. City of Springfield, et al. "Affidavit"

I was out of the office and just got your phone message from earlier this evening. Here is the court's link to the Coakley-Rivera affidavit. If this doesn't work and you still don't have it let me know.

Sent from my BlackBerry Wireless Handheld

----- Original Message -----

From: ECFnotice@mad.uscourts.gov <ECFnotice@mad.uscourts.gov>

2/7/2007

To: CourtCopy@mad.uscourts.gov <CourtCopy@mad.uscourts.gov>
Sent: Fri Feb 02 18:21:28 2007
Subject: Activity in Case 3:05-cv-30080-MAP Arise for Social Justice, et al. v. City of Springfield, et al.
"Affidavit"

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United States District Court

District of Massachusetts

Notice of Electronic Filing

The following transaction was received from Nemser, Paul entered on 2/2/2007 at 6:21 PM EST and filed on 2/2/2007

Case Name: Arise for Social Justice, et al. v. City of Springfield, et al.
Case Number: 3:05-cv-30080 <<https://ecf.mad.uscourts.gov/cgi-bin/DktRpt.pl?97318>>
Filer: Talbert Swan, II
Frank Buntin
Norman W. Oliver
Rafael Rodriquez
Arise for Social Justice
?Oiste?
New England State-Area Conference of the NCAAP
Darlene Anderson
Gumersindo Gomez
Diana Nurse

Document Number: 94 <https://ecf.mad.uscourts.gov/cgi-bin/show_case_doc?94,97318,,16739315,,,387>

Docket Text:

AFFIDAVIT of Cheryl Coakley-Rivera by New England State-Area Conference of the NCAAP, Talbert Swan, II, Norman W. Oliver, Darlene Anderson, Gumersindo Gomez, Arise for Social Justice, Frank Buntin, Rafael Rodriquez, Diana Nurse, ?Oiste?. (Nemser, Paul)

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:yes

Electronic document Stamp:

[STAMP dcecfStamp_ID=1029851931 [Date=2/2/2007] [FileNumber=1750533-0]
[6b758fe5250f1358a29db483093fb1ef26964f004c67431e6ac7901f8f312378178e
ffdac7a40c10346ccad6bde4e084b3562add65baceaf6b3863bf23c7768]]

3:05-cv-30080 Notice will be electronically mailed to:

Nadine M. Cohen ncohen@lawyerscom.org

J. Anthony Downs jdowns@goodwinprocter.com

Monica Meier Franceschini mfranceschini@goodwinprocter.com

Paul E. Nemser pnemser@goodwinprocter.com

Edward M. Pikula epikula@omcp-law.com, epikula@springfieldcityhall.com; attyemp@aol.com

3:05-cv-30080 Notice will not be electronically mailed to:

2/7/2007

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